

OCT 7 12 09 PM '98

Federal Communications Commission

DA 98-1957

DISPATCH

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 98-179
Table of Allotments,)	RM-9334
FM Broadcast Stations.)	
(Oraibi and Leupp, Arizona))	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1998

Released: October 2, 1998

Comment Date: November 23, 1998

Reply Comment Date: December 8, 1998

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Oraibi Media Association ("petitioner"), permittee of Station KBDT(FM), Channel 255C, Oraibi, Arizona, seeking to amend the FM Table of Allotments by changing its community of license from Oraibi to Leupp, Arizona, and to modify its authorization accordingly. Petitioner premises its proposal on its desire to provide a first local aural transmission service to Leupp, and stated an intention to apply for Channel 255C if it is reallocated to that community, as requested.

2. Petitioner's proposal is filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). In support of its proposal, petitioner states that Leupp (population 857),¹ a census designated place, is governed by the Navajo Tribal Authority. Further, petitioner advises that Leupp has its own post office, schools, a church, fire department, health center, dental clinic and various commercial businesses. Additionally, petitioner reports that the Navajo Tribal Utility Authority oversees the water, sewer, electricity and gas facilities for Leupp. In sum, petitioner states that Leupp possesses the requisite social, economic and cultural components normally associated with establishing community status for allotment purposes, citing Semora, North Carolina, 5 FCC Rcd 934 (1990). In comparison, petitioner asserts that Oraibi is not listed in the U.S. Census. Further, petitioner advises that Oraibi was allotted an FM channel in the context of the Commission's omnibus rule making

¹Population figures cited herein were taken from the 1990 U.S. Census. Petitioner adds that according to the Flagstaff, Arizona, Department of Tourism, Leupp's population grew to 1,295 people in 1996.

proceeding [BC Docket No. 84-231], 50 Fed Reg. 3514 (1985), which allotted new FM channels to 689 communities. However, petitioner adds that no specific analysis was undertaken by the Commission in that proceeding to determine whether Oraibi even qualified as a bona fide community to merit an FM allotment.

3. In further support, petitioner states that the requested reallocation of Channel 255C to Leupp is mutually exclusive with its existing authorization at Oraibi as no relocation of the transmitter site for Station KBDT(FM) is proposed. Additionally, petitioner claims that adoption of its proposal will result in a preferential arrangement of allotments consistent with the Revision of FM Assignment Policies and Procedures,² 90 FCC 2d 88 (1982), as it would provide a first local aural transmission service (priority three) to Leupp. Although Channel 255C also represents the only local aural transmission service available to Oraibi (priority three), petitioner remarks that as its authorization has not been licensed to operate on Channel 255C at Oraibi, its reallocation request will not deprive the community of an "existing service", citing Midway, Panacea and Quincy, Florida, 10 FCC Rcd 6112 (1995); Sanibel and San Carlos Park, Florida, 10 FCC Rcd 7215 (1995); Pawley's Island and Atlantic Beach, South Carolina, 8 FCC Rcd 8657 (1993). Rather, petitioner asserts, the two communities will continue to receive the same number of aural broadcast services. Further, petitioner reports that as both communities presently receive at least two full-time aural broadcast services, no white or gray areas exist. Petitioner concludes that its proposal will serve the public interest by providing a first local broadcast outlet to Leupp to address the specific needs of a large Navajo population at that community.

4. Pursuant to Commission policy, if a proponent intends to move its authorized facility to a community that is adjacent to an urbanized area and its intended operation would place a city grade (70 dBu) signal over 50% or more of the urbanized area, the petitioner is required to demonstrate that the intended city of license is sufficiently independent of the central city to justify a first local service preference. See Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995). In this instance we note that Leupp is located adjacent to Flagstaff, Arizona, an urbanized area.³ Further, our engineering analysis reveals that if Channel 255C is allotted to Leupp, Station KBDT(FM) will provide a 70 dBu signal over 90% of the Flagstaff urbanized area. Therefore, the petitioner's request to change its community of license is subject to the provision of additional information responsive to a Tuck analysis to determine whether Leupp is sufficiently independent of Flagstaff to merit a first local service preference or whether

²The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters (co-equal weight is given to priorities (2) and (3)).

³According to U.S. Census Bureau data, portions of Flagstaff, Arizona, became an urbanized area in 1996. However, remote and thinly populated areas in Flagstaff were not encompassed within the boundaries of the urbanized area.

it should be credited with all of the authorized services in the Flagstaff urbanized area.⁴ Additionally, we request the petitioner to provide additional information regarding the public interest benefits that would result from the reallocation of Channel 255C from Oraibi to Leupp, Arizona, since it proposes no reception change in the present technical facilities of Station KBDT(FM) to accommodate its proposal. In this regard we note that operation with existing authorized facilities from its present site would result in Station KBDT(FM) providing a 70 dBu signal over the entire boundaries of Leupp.⁵

5. In view of the above, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. However, we do believe that the proposal warrants consideration since the requested allotment of Channel 255C to Leupp could provide that community with its first local aural transmission service, provided there is a satisfactory demonstration of its independence from the Flagstaff urbanized area. We also note that the petitioner's proposal, if granted, would deprive Oraibi of its sole local authorization as KBDT(FM) is the only station authorized to serve the community. While we carefully evaluate a proposal that would result in a loss of existing reception service, in this instance Station KBDT(FM) is not constructed. Therefore, we do not consider its removal from Oraibi to present the parallel concerns with loss of service represented by the removal of an operating station, as it does not constitute a service the public has become reliant upon. See Sanibel and San Carlos Park, Florida, supra; Pawley's Island and Atlantic Beach, South Carolina, supra; and Glencoe and LeSueur, Minnesota, 7 FCC Rcd 7651 (1992). Moreover, as the petitioner has stated it does not intend to relocate its transmitter site, Oraibi would receive a 70 dBu signal from Station KBDT(FM) once it becomes operational.

6. Channel 255C can be allotted to Leupp at the petitioner's current transmitter site located 42.2 kilometers (26.2 miles) north of the community at coordinates 35-26-34 NL and 110-58-40 WL, consistent with the technical requirements of the Commission's Rules.

7. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

⁴See Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951), RKO General, Inc. ("KFRC"), 5 FCC Rcd 3222 (1990), and Faye and Richard Tuck ("Tuck"), 3 FCC Rcd 5374 (1988). In KFRC and Tuck, the Commission clarified the type of evidence to consider in determining whether a suburban community deserves a first local service preference by relying on three factors: (1) signal population coverage; (2) size and proximity of the suburban community relative to the adjacent community; and (3) the interdependence of the suburban community with the central city.

⁵The authorization issued to the petitioner for Station KBDT(FM) (BPH-961113MB), describes its transmitter location as: "on a peak within the Newberry Mesa, on the Navajo Indian Reservation, 6.0 kilometers west of State Highway 99, Leupp, Navajo County, Arizona".

<u>Community</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Leupp, Arizona	--	255C
Oraibi, Arizona	255C	--

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before November 23, 1998, and reply comments on or before December 8, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

David D. Oxenford, Esq.
Jason S. Roberts, Esq.
Fisher Wayland Cooper Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments, Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239), at its headquarters, 1919 M Street, N.W., Washington, D.C.

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved

4. Comments and Reply Comments. Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239), at its headquarters, 1919 M Street, N.W., Washington, D.C.